IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SPRIGGIE N. HENSLEY,

Plaintiff,

v.

DICK VERHAGEN, JON E. LITSCHER,
SAM SCHNEITER, and PHIL KINGSTON,

Defendants.

OPINION AND ORDER

01-C-0495-C

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This is a civil action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Spriggie N. Hensley contends that defendants violated his First Amendment right to free speech by promulgating a Wisconsin Department of Corrections regulation banning the purchase, receipt or possession of any cassette tape.

Presently before the court are plaintiff's and defendants' cross-motions for summary judgment. Applying the law as it has developed in cases such as O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), and Turner v. Safley, 482 U.S. 78 (1987), I find that the regulation banning cassette tapes and players is reasonably related to legitimate penological interests. Therefore, I will deny plaintiff's motion for summary judgment and grant

defendants' motion for summary judgment.

From the proposed findings of fact and the record, I find the following material facts to be undisputed.

## UNDISPUTED FACTS

### A. Background

Plaintiff Spriggie N. Hensley is a maximum security inmate at Columbia Correctional Institution in Portage, Wisconsin. Defendant Dick Verhagen was the administrator of the Wisconsin Department of Corrections, Division of Adult Institutions, from December 7, 1997 to June 30, 2001. Defendant Jon E. Litscher is secretary and defendant Sam Schneiter is security chief of the Wisconsin Department of Corrections. Defendant Phil Kingston is warden of the Columbia facility.

David A. Westfield is security director for the Dodge Correctional Institution in Waupun, Wisconsin, and has held this position since July 2000. Westfield has worked in security-related positions at the Department of Corrections since January 5, 1981. As security director at the Dodge facility, Westfield is responsible for developing, administering and supervising the overall security program in accordance with Department of Corrections directives and philosophy. Since 1997, Westfield has been chair of the Department of Corrections Inmate Property Committee. This committee recommended that a ban on

cassette tapes and players be imposed on inmates in Wisconsin prisons to accommodate prison officials' security, administrative and rehabilitative concerns. The conduct reports that accompany Westfield's affidavit were collected by the committee during the decision making process; these reports do not represent all conduct reports issued regarding cassette tapes and players.

As of June 1, 1999, inmates housed in Wisconsin prisons are no longer allowed to receive cassette tapes or any device equipped with a cassette player. As of June 1, 2000, Wisconsin inmates are no longer allowed to (1) purchase or possess cassette tapes or (2) possess a cassette player unless the player is combined with another electronic device and only if that combined device was purchased before June 1, 1999. Rather than eliminate cassettes and players all at once, the ban was phased in to minimize inmate disruption, to permit staff to become familiar with the new regulations and to allow for attrition of these items as a result of breakage and inmate release.

Some inmates have cassette players that are coupled with other devices, such as a radio or television. Because eliminating these devices might create an extraordinary financial hardship or leave an inmate without a television or radio, inmates are allowed to keep combination units notwithstanding security concerns. These concerns include misuse of the players as tattoo guns or as devices to record staff and inmate conversations. Defendants believe that attrition will eliminate the security concerns with the combination units over

time.

Before June 1, 2000, each inmate in the general population was permitted to possess a cassette player and up to 15 cassette tapes, subject to restrictions as to use, content, source and conditions. Before the ban took effect, each incoming cassette tape was screened for content, engraved with the inmate's identification number and sealed at each end with tamper-proof tape.

B. Security, Administrative and Rehabilitative Concerns

Cassette tapes present a special security problem because they are used to store drugs or other contraband, such as weapons. Cassettes are small and easily concealed. Because of their physical construction, hidden contraband cannot be easily seen by examining the outside of a cassette tape. A cassette cannot be disassembled without possible damage to the tape, which leads to inmate grievances for staff destruction of property. Allowing only clear cassettes or compact discs would alleviate some security concerns. It is time consuming to disassemble cassette tapes and search them for contraband. Plaintiff believes that staff need only check the security tape to establish whether an inmate has tampered with a cassette tape. It is time consuming to check each inmate's cassette against his property list in the course of regularly conducted cell searches.

Eliminating cassettes eliminates cassette players, which, in turn, prevents misuse of

the player's motor as a tattoo gun. Homemade tattoos jeopardize inmate health and safety. Although a cassette player's recording function is required to be disabled, inmates can and do reactivate this function by jury-rigging the player. Eliminating cassette players prevents inmates from recording inmate and staff conversations and then editing the tapes to blackmail or harass staff and other inmates.

Many prerecorded tapes contain explicit lyrics that promote racial hatred, violence toward law enforcement officers, gang lifestyles, illegal drug use and abuse of women and children. The Department of Corrections spends large sums of money on programs for drug and alcohol abuse, anger management, sex offender treatment and criminal-thinking modification. These types of tapes undermine security and rehabilitation programs. Many inmates have limited impulse control and need very little encouragement to act out, cause disruptions or engage in violent and anti-social activities. Smaller distributors do not display warning labels on their cassette packaging. Because cassettes without warning labels are available from smaller distributors, hate groups and others, the lack of such a label is not a reliable indicator of a cassette's contents. The splicing or altering of cassettes by inmates renders warning labels unreliable. Cassettes can be used to communicate escape plans, facilitate gang communications or arrange assaults and prison disruptions.

Requiring inmates to order cassette tapes from a list of approved retail outlets would address some security concerns. Defendants considered disallowing all cassettes with

warning labels and creating a list of approved retail outlets but rejected this alternative because such labels are not a reliable indicator of lyrics that undermine rehabilitative programming and security concerns. If inmates were restricted to certain approved outlets, defendants believe that they would receive complaints of unfair treatment because the selected outlets did not carry an inmate's preferred music.

Administrative regulations require prison staff to conduct regular cell inspections for the purposes of controlling inmate property and eliminating contraband. It is common practice for inmates to exchange cassettes. Cassettes are bartered and used as currency. Because of their small size, cassettes are readily stolen. Disciplinary investigations and proceedings regarding the theft, bartering and exchange of cassettes consumes valuable staff time. Each institution has the discretion to determine the severity of the penalty for property violations or concealment of contraband, subject to Wis. Admin. Code chapter DOC 303. Property violations, such as concealing contraband, bartering, trading, lending or altering cassettes are typical violations that occur with respect to virtually all other property. The security concern for a given property item violation varies depending on the type of property.

Compact discs were considered in lieu of cassettes. Allowing compact discs would address contraband concealment concerns but would not alleviate the need to monitor for content, address the costly and time-consuming property processing and cell search concerns

or eliminate theft, bartering and exchange concerns.

When the Department of Corrections began allowing each inmate to possess up to 15 cassettes, there were far fewer inmates in the Wisconsin prison system. As of March 8, 2002, there are more than 16,000 inmates in Wisconsin prisons. If only 10,000 of these inmates possess 15 cassettes, there would be 150,000 cassettes to process and oversee. Such oversight and administration is time consuming and costly. Each cassette must be logged into property records every time an inmate is transferred to and from an institution and every time an inmate is removed from his cell as part of a disciplinary action. Staff resources are insufficient to monitor every cassette that comes into an institution because prison staffing has not kept up with the increase in inmate population. With tighter budgets anticipated, even fewer employees will be available for monitoring cassettes.

Eliminating cassettes reduces (1) the number of property items prison staff must search in the course of a cell search and, thus, the overall time required to search cells; (2) the amount of time staff spend on monitoring for prohibited content; and (3) the amount time and physical space needed to store and process contraband cassettes that are the subject of disciplinary proceedings. These time and space savings can be devoted to other security and program-related functions.

Cassettes are allowed in out-of-state contract facilities that house Wisconsin inmates. The Department of Corrections allows out-of-state facilities to determine their own security

and administrative needs and to impose their own conditions of confinement so long as those conditions comply with the law.

General population inmates at Columbia Correctional Institution such as plaintiff are allowed to use personal radios in their cells at any time to listen to music, news and other cultural programing. These inmates are also allowed to use personal televisions in their cells at any time. The institution provides cable programming, which includes CBS, ABC, NBC, PBS, FOX and an institution channel that airs informational, educational, religious, health, treatment and recreational programming. General population inmates at Columbia may send and receive mail, including personal letters, newspapers, books and magazines, subject to Wis. Admin. Code §§ DOC 309.04 and 309.05. Inmates have access to general and legal collections at the institution's library. The library subscribes to ten newspapers and 24 magazines, including the Milwaukee Journal Sentinel, USA Today, Wisconsin State Journal, Time and Sports Illustrated. These publications may be read in the library. The general library collection consists of over 15,000 volumes of fiction and non-fiction. General population inmates may read books in the library or borrow up to three non-reference books at one time to read in their cells. Inmates are provided educational programming in the form of classes.

OPINION

The First Amendment states, in relevant part, "Congress shall make no law . . . abridging the freedom of speech." The First Amendment protects "the right to receive ideas no less than it protects the right to disseminate them." Johnson v. Anderson, 370 F. Supp. 1373, 1391 (D. Del. 1974); see also Sizemore v. Williford, 829 F.2d 608 (7th Cir. 1987) (complaint stated claim of First Amendment violation to extent it alleged that prison officials withheld and never delivered copies of inmate's daily newspaper); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (prison policy of refusing to deliver mail written in language other than English violated First Amendment when one-third of prison population was Hispanic and government offered no justification for policy). The Supreme Court recognizes that "'convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement.'" Woods v. O'Leary, 890 F.2d 883, 884 (7th Cir. 1989) (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987)). Although prisoners retain First Amendment rights while incarcerated, the exercise of such rights is limited by the fact of confinement and the needs of the penal institution. See Bell v. Wolfish, 441 U.S. 520, 545 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977).

Plaintiff contends that the regulation banning the purchase, receipt or possession of any cassette tape violates his First Amendment rights because it is arbitrary and overbroad,

was enacted without consideration of available alternatives and does not serve a legitimate penological interest. Defendants argue that plaintiff does not have a constitutional right to entertainment in a form that is most convenient to him and that plaintiff can listen to music on his AM/FM radio, view television and read books, newspapers and magazines while incarcerated.

Contending that music is protected speech, plaintiff cites Betts v. McCaughtry, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993), in which this court held that rap music constitutes speech protected by the First Amendment. See also Luke Records, Inc. v. Navarro, 960 F.2d 134, 137 (11th Cir. 1992). Although Betts focused on the narrower subject of rap music, it seems evident that such a right could not be limited to rap music. All genres of music, not just rap, express politically and culturally significant ideas in one way or another and are worthy of First Amendment protection in the same way as literature and visual arts. Nevertheless, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner, 482 U.S. at 89; see also O'Lone, 482 U.S. at 348 ("The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security."). Therefore, the central question is this case is whether the ban on cassette tapes and players is reasonably related to legitimate penological interests.

It is important to note at the outset that courts are required to give considerable deference to prison officials in adopting policies that serve security interests. A court may "not substitute [its] judgment for [prison officials'] 'in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations.'" Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). To determine whether a prison practice is reasonable, a court must examine four factors: (1) whether a valid, rational connection exists between the regulation and a legitimate governmental interest; (2) whether the prisoner has available alternative means of exercising the right in question; (3) whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources; and (4) whether there are obvious, easy alternatives at a de minimis cost. Turner, 482 U.S. 89-91; see also Thornburgh v. Abbott, 490 U.S. 401 (1989); Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988).

In applying this test, the Court of Appeals for the Seventh Circuit has noted that "[i]t is critically important . . . that the record reveal the manner in which security considerations are implicated by the prohibited activity." Caldwell, 790 F.2d at 597. Although Caldwell was decided before O'Lone and Turner, the court of appeals has noted that these cases "have served to clarify and amplify, rather than depart from, the Caldwell standard." Williams, 851 F.2d at 877 n.6 (quoting Hadi v. Horn, 830 F.2d 779, 784 n.6 (7th Cir. 1987)). Prison

officials can show how security concerns are implicated by submitting an affidavit of a person responsible for making discretionary decisions related to security matters indicating that the regulated conduct "constitute[s] a threat of potential violence or [is] disruptive of institutional security." Id. at 599. In this case, defendants submitted the affidavit of Daniel A. Westfield, security director of the Dodge Correctional Institution and chair of the committee that reviews inmate personal property issues and policies and makes recommendations regarding such property to the administrator of the Division of Adult Institutions. In his affidavit, Westfield summarizes the security, rehabilitative and administrative concerns that cassette tapes and players raise and the rationale for banning them in Wisconsin prisons. I will examine the four factors of the Turner reasonableness test in light of Westfield's affidavit.

1. Legitimate penological interest

The first Turner factor is whether a valid, rational connection exists between the regulation and a legitimate government interest. Turner, 482 U.S. at 89. Defendants argue that banning all cassette tapes and players is neutral and reasonably related to legitimate penological goals of prison security, rehabilitation and administration. Specifically, defendants have put in evidence to show that cassettes are small and easily stolen, are bartered or used as currency, have to be screened for impermissible lyrics that undermine

rehabilitative programming and security concerns, are used to hide contraband, are spliced or doctored and are used to record escape plans, foster gang communications and promote prison assaults and prison disruptions. Cassette players are jury-rigged to record staff and inmate conversations and are converted into tattoo guns. In addition, each cassette tape must be logged on inmate property records every time an inmate is transferred to or from a facility and every time an inmate is removed from his cell as part of a disciplinary action. It is undisputed that this oversight and administration is time consuming and costly. It is also undisputed that staffing has not kept up with the increase in the Wisconsin prison population and that staff resources are insufficient to monitor every cassette.

Plaintiff argues that because defendants allow out-of-state facilities (which house Wisconsin inmates under contract) to determine independently whether cassette tapes will be allowed in their facilities, defendants' alleged concerns that cassettes can be used to facilitate escape and undermine rehabilitative programs are disingenuous. If defendants were legitimately concerned about escape and rehabilitation, plaintiff argues, they would also require out-of-state facilities to ban cassettes. This argument fails because plaintiff's focus is too narrow and he ignores defendants' other security and administrative concerns. In other words, plaintiff must view defendants' concerns collectively rather than picking out one or two concerns and alleging speciousness. Defendants have put in facts to show not only that cassette tapes present security concerns but that the sheer number of inmates and

dearth of security personnel makes it impossible for these security concerns to be monitored and enforced. In addition, plaintiff's conclusion as to defendants' sincerity with respect to out-of-state cassette policies is mere speculation. For example, one could also speculate that out-of-state facilities have greater prison staffing and can monitor for impermissible content effectively. Under these speculative circumstances, such a facility would have little or no concerns regarding cassette tapes and their use to foster inmate escape or negate rehabilitative programs. Simply put, plaintiff's own speculation does not serve to rebut defendants' proffered security and rehabilitative concerns.

Plaintiff argues that administrative inconvenience does not justify usurping his constitutional rights, but the same argument has proved unsuccessful before the Supreme Court. See, e.g., O'Lone 482 U.S. at 358 (Brennan, J., dissenting) ("If a directive that officials act 'reasonably' were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary."). In O'Lone, the majority took the view expressed in Thornburgh, 490 U.S. at 407, that First Amendment "rights must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration." O'Lone, 482 U.S. at 349 (validity of regulation includes examining impact on other inmates, prison personnel and allocation of prison resources); see also Turner, 482 U.S. at 85. Moreover, defendants do not assert mere "inconvenience"; they argue that such oversight and administration is time consuming and costly and that this time and money is better

spent on other security needs and rehabilitative programs.

Westfield provided conduct reports (which the Inmate Property Committee collected as part of their decision making process) to demonstrate that defendants expend large quantities of time and resources addressing problems caused by cassette tapes and players. Plaintiff notes that half of the conduct reports that Westfield provided were for minor offenses and the other half for major. Plaintiff dissects and tabulates these reports and then argues that they prove little more than "staff inconvenience." However, in plaintiff's tabulations, he fails to observe that at one institution alone, 16 cassette-related conduct reports were issued in a three- to four-day time span. Such evidence bolsters defendants' position that the oversight and administration of cassette tapes and players is burdensome, time consuming and costly.

The state has shown that its prohibition on cassette tapes is rationally connected to legitimate security, rehabilitative and administrative concerns.

2. Alternative means of exercising right

The second Turner factor focuses on the existence of alternative means of exercising the right in question available to the prisoner. Turner, 482 U.S. at 90. Defendants argue that plaintiff may still listen to AM/FM radio, view cable television and read books, newspapers and magazines in order to receive cultural and political ideas. Plaintiff argues

that these alternatives are not a substitute for cassettes, which allow inmates to select music of their choice as a direct reflection of the inmate's culture, heritage and ideology. However, Turner asks whether an inmate is deprived of "all means of expression." See O'Lone, 482 U.S. at 352 (citing Turner, 482 U.S. at 92.). Plaintiff has not been deprived of all means of musical expression because he has access to the broad spectrum of AM and FM radio. It is true that the music selection available on the airwaves might not be as broad or convenient as music available on cassette. However, plaintiff's First Amendment rights are limited by the fact of confinement and the needs of the penal institution. See Wolfish, 441 U.S. at 545.

3. Impact on allocation of prison resources

The third Turner factor is whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources. Turner, 482 U.S. at 90. Defendants argue that accommodating plaintiff's asserted right to possess cassette tapes places an extreme burden on guards, inmates and prison resources. Defendants recount the same security, administrative and rehabilitative concerns discussed earlier. In addition, defendants assess the impact of allowing cassettes in terms of the rapid growth of the Wisconsin prison population and foreseeable budget constraints. As with the first Turner factor, plaintiff questions the veracity of defendants' asserted burdens because out-of-state facilities are

allowed to determine their own security and administrative needs. This argument fails for the same reason it did earlier; it is too narrow and fails to view defendants' security, administrative and rehabilitative concerns collectively. As the Supreme Court has noted, "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." Turner, 482 U.S. at 90. "When the accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Id. Defendants argue that the right to possess cassette tapes can be exercised only at a cost of significantly less liberty and safety for other inmates and guards. Plaintiff argues that cassettes have been allowed in prisons for at least 12 years and that this fact establishes that defendants' alleged security and administrative concerns are overstated. However, plaintiff fails to recognize three major factors that have changed the landscape over the past decade: (1) the growth in the Wisconsin prison population; (2) reduced staff resources; and (3) the anticipation of tighter budgets in the future.

Defendant has met the third Turner factor by showing that the continued accommodation of plaintiff's asserted right will have a negative impact on prison resources. The drain on prison resources will have a negative effect on security, rehabilitative programs and staffing, which, in turn, will have a negative impact on other inmates and prison staff.

4. Obvious and easy alternatives

The fourth and final Turner factor is whether there are obvious, easy alternatives at a de minimis cost to valid penological interests. Turner, 482 U.S. at 90. Obvious and easy alternatives may be evidence that the regulation is not reasonable and is an exaggerated response to prison concerns. Id. However, this factor is not a "least restrictive alternative" test; prison officials do not have to set up and shoot down every conceivable alternative. Id. To support a regulation, prison officials must advance security considerations that are directly implicated by the protected activity and sufficiently articulated to permit meaningful constitutional review. Caldwell, 790 F.2d at 599. Once prison officials have satisfied this burden by introducing evidence of this nature, the court must defer to the judgment of prison officials unless the inmate can demonstrate that prison officials have exaggerated their response. Id. at 599-600.

Plaintiff points to several alternatives that defendant allegedly ignored. First, plaintiff argues that requiring inmates to order from a list of approved vendors would address the staff burden of listening to tapes for content. However, it is undisputed that defendants considered this alternative and rejected it because they have found that warning labels are not a reliable indicator of lyrics that undermine rehabilitative programming and security concerns. In addition, plaintiff's approved vendor alternative would not alleviate the myriad of other prison concerns such as theft, splicing or doctoring tapes, bartering, hiding

contraband, misusing players as tattoo guns or by recording conversations or the need for prison officials to constantly track these property items when inmates are transferred or during a cell search.

Second, plaintiff argues that compact discs from approved vendors should be allowed in lieu of cassettes. (Defendants respond by taking the odd position that plaintiff has not exhausted his administrative remedies with respect to proposing compact discs as an alternative. Such an exhaustion argument is legally frivolous. In making his legal argument, plaintiff is required to address each of the four legal elements. He is not required to file separate inmate complaints addressing each element. Aside from the legal requirements, it may be that plaintiff can persuade prison officials of his position on compact discs if he pursues his administrative remedies.) Plaintiff asserts that compact discs would eliminate defendants' arguments of hidden contraband, splicing or doctoring tapes and misuse of the player. It is undisputed that defendants considered and rejected this alternative because compact discs would still present the security problems of monitoring content because of inadequate warning labels, theft, bartering and the constant tracking of these property items. Plaintiff suggests that theft and bartering could be eliminated by imposing stiffer penalties for these violations. Defendants counter that plaintiff is by no means an expert in prison management and that his speculation is especially dubious in light of the fact that existing penalties have not eliminated such problems. Defendants are correct that a court must defer

to the rationale of prison officials in the absence of "substantial evidence in the record to indicate that the officials have exaggerated their response." Caldwell, 790 F.3d at 596. Plaintiff has failed to put forth substantial evidence suggesting that defendants have exaggerated their response to cassette tapes and players.

Because I conclude that the regulation banning cassette tapes and players is reasonably related to legitimate penological interests, I will deny plaintiff's motion for summary judgment and grant defendants' motion for summary judgment.

## ORDER

IT IS ORDERED that plaintiff Spriggie N. Hensley's motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 23rd day of May, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge